

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of FELICIA LEONOR GONZALEZ,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JOSE FRANCISCO GONZALEZ,

Respondent-Appellant,

and

JESSICA LYNN FERGUSON,

Respondent.

UNPUBLISHED
November 13, 2003

No. 244789
Wayne Circuit Court
Family Division
LC No. 95-326826

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Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JESSICA LYNN FERGUSON,

Respondent-Appellant,

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No. 244831
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Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor child. The trial court terminated respondent Ferguson's parental rights under MCL 712A.19b(3)(a)(ii), (g), (i), (j) and (k)(i). The trial court terminated respondent Gonzalez' parental rights under MCL 712A.19b(3)(a)(ii) and (k)(i). We affirm in part and reverse in part.

I. Basic Facts And Procedural History

The FIA's involvement with Ferguson began in 1995 when she was a respondent in a child protective proceeding involving four older children. The court terminated Ferguson's parental rights to the older children, in part because of her history of drug abuse and her failure to comply with the substance-free plan set forth in the parent/agency agreement.

On June 3, 2002, Ferguson gave birth to Felicia Gonzalez who, according to medical records, was born with cocaine in her system. Hospital records indicated that Gonzalez visited Felicia Gonzalez on June 4, 2002. Hospital records also included a verification of birth naming Gonzalez as the father and providing his social security number. The court ordered the infant placed in temporary foster care directly from the hospital and scheduled a preliminary hearing for the following day. The order indicated that the parents had voluntarily relinquished physical custody of the child.

Immediately following Felicia Gonzalez's release from the hospital to foster care, the FIA filed a petition asking the court to take permanent custody of her and terminate both respondents' parental rights. The petition alleged that Ferguson had tested positive for cocaine and marijuana, that the infant had tested positive for cocaine, and that protective services had inquired at the Scripps Street address Ferguson had given at the hospital and was told she did not live there. The petition also alleged that Gonzalez was said to be the acknowledged father, but his whereabouts were unknown and his paternity acknowledgment and visitation at the hospital were not yet verified.

A preliminary hearing was held before a referee and neither parent appeared. The referee asked George Dwelley, protective services investigator for the FIA, about his attempts to notify the parents. Dwelley stated that he had notified the mother about the hearing in the morning and she indicated that she would attend. As for the father, Dwelley stated that he had not been in contact with him and did not know how to reach him. The referee found that adequate attempts had been made to notify the parents. He authorized the petition, continued placement of Felicia Gonzalez in foster care, suspended the parents' visitation, and scheduled the pretrial.

Neither parent was present for the pretrial. When asked about his efforts to contact the parents, Dwelley indicated that his only contact with the mother was after the preliminary hearing. Thereafter, he worked through the maternal grandmother, who informed Dwelley that Ferguson was "back on the street." The maternal grandmother also offered a plan for the baby. Dwelley indicated he still had not located the father and did not know if Gonzalez was a putative or legal father. When the court asked Dwelley if he had any information, such as a birth certificate or Friend of the Court case acknowledging paternity, Dwelley indicated he did not.

Erma Herbin, the FIA foster care worker, stated that she had been assigned to the case a week before and had not had contact with either Ferguson or Gonzalez. Herbin determined that

Gonzalez did not live at the address that Ferguson had given to the hospital. The referee found that reasonable efforts had been made to locate the parents and authorized service of process by publication for both parents.

The permanent custody hearing began before a referee on August 7, 2002. The referee took judicial notice of all prior orders and findings of fact and admitted the birth records and medical records of Felicia Gonzalez. Dwelley testified that he had obtained the case records concerning Ferguson's previous children and determined that they had been made permanent wards of the court. Soon after receiving the case, he attempted to contact Ferguson at the address provided on the hospital referral but discovered that Ferguson did not live there. He talked with an unidentified gentleman sitting on the porch, gave him his business card, and asked him to give the card to Ferguson if she came by in the near future. After the preliminary hearing, Ferguson told Dwelley it was her father's address, and that she did not live there.

According to Dwelley, the only time he had contact with Ferguson was immediately after the preliminary hearing, when she arrived about five minutes after it concluded. When she finished conferring with her attorney, Dwelley interviewed her for about twenty minutes and gave her his business card. She told him that she had used drugs sporadically during her pregnancy and that her mother was transporting her to a drug treatment program that day. She was concerned that she would not be able to attend the pretrial, because she would be in treatment. She did not identify the program and did not give him a telephone number where she could be reached. Dwelley had no information confirming that she was in treatment. Based on information from Ferguson's mother, Dwelley believed that Ferguson was not in drug rehabilitation but was on the streets prostituting.

Ferguson also told Dwelley that Gonzalez was Felicia Gonzalez's father, but Dwelley had been unable to locate Gonzalez. The only person who ever contacted him about the child's welfare was the maternal grandmother. Dwelley recommended that the parental rights of both parents be terminated. The maternal grandmother was present at the hearing and confirmed that Ferguson was "on the street" and nobody knew where she was living.

The referee noted that personal service and service by certified mail on the parents had not been accomplished, despite several attempts to do so, and that the previously ordered publication had not been timely. After going off the record, the referee again found that reasonable efforts had been made to locate the parents and again authorized service by publication. The referee preserved Dwelley's testimony and continued the hearing over to September 18, 2002.

When the hearing resumed, the referee verified that service by publication had been accomplished for both parents. Because neither parent appeared at the hearing, the referee proceeded to closing arguments. The referee found statutory grounds for termination of both respondents' parental rights, stating that Ferguson had prior terminations, used drugs during her pregnancy, was aware of the ongoing proceedings affecting her parental rights, and had no involvement in them. Regarding Gonzalez, the referee found that he deserted Felicia Gonzalez by not coming forward at any time to plan for the child. In a written report and recommendation, the referee found further that Felicia Gonzalez came within the provisions of the Juvenile Code based on Ferguson's history of substance abuse problems and the parents' abandonment of, and failure to protect, Felicia. The referee also found that Gonzalez was the legal father of Felicia

Gonzalez, but did not explain the basis of his determination. The referee recommended termination of parental rights under MCL 19(b)(3)(a)(ii) (desertion), (g) (failure to provide proper care and custody), (i) (parental rights to siblings have been terminated), (j) (likely risk of harm if returned home), and (k)(i) (parent abused child, which included abandonment). The trial court adopted the referee's recommendations and entered an order terminating respondents' parental rights on September 25, 2002.

II. Docket 244789

A. Standard Of Review

In Docket No. 244789, Gonzalez argues that service by publication was improper in this case. Whether a trial court has personal jurisdiction over a party is a question of law that we review de novo.¹

B. The Notice Requirement

A parent of a child who is the subject of a child protective proceeding is entitled to personal service of a summons and notice of the proceedings.² Failure to provide notice of a termination proceeding by personal service as required by statute is a jurisdictional defect that renders all proceedings in the trial court void.³ If personal service is impracticable, however, substituted service is permissible.⁴ Under MCR 5.920(B)(4)(b), if personal service is impracticable or cannot be achieved, the court may direct that service be made by certified mail addressed to the last known address of the party. Under MCR 5.920(B)(4)(c), if the court finds that service cannot be made because the whereabouts of the person to be summoned has not been determined after reasonable effort, the court may direct any manner of substituted service, including publication. MCL 712A.13 permits service by certified mail or publication if the court is satisfied that it is impracticable to personally serve the notice of a termination proceeding. The alternative methods of service are sufficient to confer jurisdiction on the court.⁵ Also, statutes requiring notice to parents must be strictly construed.⁶

C. The Caseworkers' Attempts To Contact Gonzalez

The caseworkers' testimony at the preliminary hearing and the pretrial hearing was merely they had not had contact with Gonzalez. They did not indicate what efforts, if any, they had made to locate him. This was due, in part, to the referee's failure to specifically ask them what they had done to locate Gonzalez. The petition indicates that the FIA was aware of possible paternity acknowledgement and a hospital visit, yet the caseworkers did not testify that they tried

¹ *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000).

² MCL 712A.12; MCR 5.920(B); MCR 5.921(B).

³ *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999).

⁴ MCL 712A.13; MCR 5.920(B).

⁵ *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993).

⁶ *Atkins*, *supra* at 251.

to pursue those leads. When asked about having information, such as a birth certificate or a Friend of the Court case, the caseworker stated only that he had none; he did not say that he had actually checked county and Friend of the Court (FOC) records. The referee nonetheless found that reasonable attempts to notify Gonzalez had been made and authorized publication at the pretrial hearing. The FIA delayed in subpoenaing hospital records, which contained a verification of birth document that included Gonzalez' social security number. The records were eventually introduced at the initial permanent custody hearing. Again, there was no testimony from caseworkers about efforts made to locate Gonzalez by matching his social security number with Secretary of State or FOC records.

Before ordering publication a second time at the initial permanent custody hearing, the referee stated that several attempts to serve Gonzalez had been made by personal service and certified mail. The record, however, shows that the FIA attempted to serve Gonzalez only once. A summons and petition were sent by certified mail to an address the FIA later determined was incorrect and returned as undeliverable. Although the record includes four identical summonses prepared for personal service, there is no notation on them indicating that personal service was never attempted.

Under these circumstances, we conclude that service by publication was improper. It was error for the court to allow such notice without first questioning the caseworkers about what they had actually done to locate Gonzalez. The record indicates that they had information from the beginning about a paternity acknowledgment and hospital visit. It would have been reasonable for the FIA to pursue these leads, which would have uncovered Gonzalez' social security number and a possible address from Secretary of State or FOC records. Thus, we conclude that the trial court erred when it allowed substituted service by publication and, therefore, proceeded without jurisdiction with regard to Gonzalez.

III. Docket 244831

A. Standard Of Review

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence.⁷ If the court determines that a statutory ground for termination has been established, it must terminate parental rights unless clear evidence exists on the whole record that termination is not in the child's best interests.⁸ An appellate court reviews a trial court's decision to terminate parental rights for clear error.⁹ "To be clearly erroneous, a decision must strike us as more than

⁷ *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999).

⁸ MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000).

⁹ *Sours*, *supra* at 633.

just maybe or probably wrong.”¹⁰ This Court gives due regard to the trial court’s special ability assess the witnesses’ credibility.¹¹

B. Ferguson’s Contentions

Ferguson contends that the FIA made inadequate efforts to locate her, which resulted in the FIA’s failure to develop a case service plan for reuniting mother and child and the trial court’s failure to review the plan. She relies on MCL 712A.18f and MCR 5.973(A) to support her claim that the FIA was required to make efforts to assist her. Other provisions, however, authorize a trial court to terminate parental rights at the initial dispositional hearing if the original petition requests termination, thereby eliminating the need to develop and consider a case plan to reunite the family. MCL 712A.19b(4) and MCR 5.97(D).

In this case, the FIA was not required to develop a plan because it requested permanent custody in its original petition. The FIA’s development of a case plan for reunification would have been contrary to its plan for permanent wardship. Further, the record does not support Ferguson’s claim that the FIA made inadequate efforts to locate her. Accordingly, we conclude that reversal of the termination of her parental rights is not warranted.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Jane E. Markey

¹⁰ *Id.*

¹¹ MCR 2.613(C).